JUN 14 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1957.

No. ~~1092~~ 194

FLORENCE KOSTNER,

Petitioner,

vs.

CHICAGO LAND CLEARANCE COMMISSION, a Municipal Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Florence Kostner, petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered in the above-entitled cause on January 24, 1957.

Opinion Below:

The opinion of the Supreme Court of Illinois (No. 34174) is reported in 10 Ill. 2d 501. A copy thereof is attached hereto as Appendix A.

Jurisdiction:

(I) The judgment of the Supreme Court of Illinois is dated and was entered on January 24, 1957. (II) The date of the order denying the rehearing was March 19, 1957. (III) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is Title 28 U.S.C.A. Sec. 1257 (3).

Questions Presented For Review:

Chicago Land Clearance Commission was created as municipal corporation by the Illinois legislature. It was granted the power to acquire real estate by eminent domain proceedings.

In April 1953 it brought suit in the Circuit Court of Cook County to condemn several parcels of real estate including three parcels owned by the petitioner here. Petitioner having been served with process entered her appearance (by her attorney) in June 1953. Six or seven months later and in January 1954 the Trial Judge entered an order, in substance providing that all parties defendant desiring to challenge the right to bring the proceedings shall do so by written pleading within 7 days thereafter; failing so to do defendants not so contesting shall be deemed to have waived the right to contest and the right of the Commission to proceed to have just compensation determined (R. 20). Thereafter and on three occasions, viz., on April 22, 1955 (R. 34); on June 13, 1955; and on Oct. 31, 1955 (R. 53), petitioner sought leave of the Trial Court to file a pleading challenging the right to condemn. On each occasion leave was denied based upon the order entered in January 1954 denying such right after a seven-day period. The tendered traverse (R. 44-53) offers of twenty-eight points of challenge

amongst which is an assertion (R. 47; point No. 26) that the petitioner is denied rights under the 14th amendment to the Constitution of the United States.

In Illinois its Constitution restricts the sovereign power of eminent domain by providing that private property shall not be taken for public use without just compensation. An enabling statute of the legislature does not limit the time for contesting the right to take nor does it provide that any defense pleading be filed. Thus the instant case presents a picture wherein the Trial Judge by judicial fiat, so to speak, proceeds to fix a seven-day barring period and thereafter refuses to allow challenge when challenge was offered on three different occasions.

Thus the question presented here for review is: Can a State Trial Court in an eminent domain proceeding bar a property owner from questioning the right of the public authority to condemn, solely by court order, and contrary to legislative policy as declared, and thereby cut off all constitutional and other issues? Does not such procedure defy the constitutional mandate found in the 14th Amendment to the Constitution of the United States?

Illinois Constitution, Article and Section and Statutes Involved:

The part of the constitutional provision of the Illinois Constitution involved is found in Sec. 13 of Article II and is as follows:

> "Private property shall not be taken or damaged for public use without just compensation."

Sections 2, 2a, 5 and 5a of the Eminent Domain Act of the Illinois Legislature (Chap. 47 Ill. Rev. Stat. 1955) are set forth in Appendix B. The plaintiff below was created by virtue of the provisions of what is commonly

known as "Blighted Area Redevelopment Act of Illinois" Sec. 63 to 91, Chapter 67½ Ill. Rev. Stat. 1955. Inasmuch as the review sought in this Court does not at this time involve the validity of this Act or any part thereof, we do not deem it necessary to spell out the entire enactment or any of its provisions.

Statement of the Case:

The Chicago Land Clearance Commission, a municipal corporation, was created under the provisions of what is termed the "Blighted Area Redevelopment Act" of Illinois of 1947 (Sec. 63-91, Chap. 67½ Ill. Rev. Stat. 1955).

On April 2, 1953, the Commission filed a proceeding in the Circuit Court of Cook County, Illinois, to condemn several parcels of real estate in the City of Chicago (Abs. 1 to 10). Petitioner here who owned three parcels of real estate in the area was named as a defendant. On May 14, 1953, she, through an attorney entered her written appearance. Between September 1953 and Jan. 26, 1954, orders were entered from time to time dealing with trial as to various parcels involved (R. 10 to 19). On Jan. 26, 1954 (R. 20) the following order was entered by the then presiding Trial Judge.

> "On Motion of William F. Morrisey, and Wilson McIlvane, counsel for Petitioner herein;
>
> It is ordered, that all respondents herein who desire to contest the right of the Petitioner to maintain this condemnation suit and who have not heretofore done so be, and they are, hereby ruled to file a traverse or other proper pleading contesting such right within seven days from this date; and if such pleading is not filed within this period, respondents will be deemed to have waived the right to file such pleading or to contest the right of Petitioner to proceed to have just compensation determined.

On April 22, 1955, an order was entered in substance as follows (R. 34): (a) permitting new counsel to be substituted as attorneys for the petitioner here; (b) that it appearing that the petition for condemnation was filed on Apr. 2, 1953 and that counsel filed an appearance for Florence D. Kostner in June 1953; that an order was entered on Jan. 26, 1954 ruling all respondents to plead within 7 days; that Florence Kostner failed and refused to file any pleading within said time; (c) it appearing from the records that more than 25 continuances in the trial on the issue of just compensation have been granted to the respondent (Florence Kostner); accordingly the motion of the new (substituted counsel) for leave to file a traverse within 5 days is denied.

On June 13, 1955 (Rec. p. 43) petitioner here (Florence Kostner) filed another petition seeking permission of the then Trial Judge to file a traverse to the condemnation petition; she stated that she had been ill for some period of time and unable to see; that she assumed that a traverse had been filed in apt time in 1954. On said date she again tendered a written traverse; this traverse contained some 29 objections to the right to bring and maintain the condemnation proceedings. (R. p. 45 to 48, inc.) Amongst the objections so tendered was objection No. 26 (R. p. 47) which charged that the condemnation petition and proceedings defied the Fourteenth Amendment to the Constitution of the United States. The application for leave to file the traverse was continued from time to time thereafter and finally overruled on Feb. 14, 1956 (Rec. 63). The opinion of the Trial Judge is found in the record (R. 63) and is attached hereto as (Appendix C). Thereafter the cause proceeded to trial before a jury limited only as to just compensation. No evidence was offered nor proof tendered by the condemnation peti-

tioner relative to the right to bring or maintain the proceeding (R. 51) pursuant to the Illinois constitutional mandate and the enabling legislation creating the petitioner and prescribing its rights and duties (R. 51). Judgment was entered on the verdict of the jury fixing the compensation (R. 51).

Thereafter an appeal was taken to the Supreme Court of Illinois (R. 52) which court affirmed the Trial Court's judgment order (Appendix D); the opinion of the Supreme Court of Illinois is attached hereto as Appendix A.

In the traverse tendered for filing on June 13 (R. p. 43), and in point 26 (R. p. 47) the petitioner here charged that the taking of her property by condemnation was violative of both the State and Federal Constitutions; specifically averring defiance of the mandate of the 14th Amendment to the Constitution of the United States.

The Trial Court and the reviewing Court, viz., the Supreme Court, treated the question of the right to challenge as presenting solely a question of the exercise of judicial discretion and ergo did not undertake to pass upon the constitutional questions raised.

The Copy of the Judgment of the Court Below:

Appendix (D) hereto is a copy of the judgment of the State Supreme Court and its order denying petitioner's petition for a rehearing.

ARGUMENT.

Implementing the constitutional restraint found in Sec. 13 of Article II of the Illinois Constitution adopted in 1870, the legislature adopted the Eminent Domain Act in 1872. (Chap. 47 Ill. Rev. Stat. 1955.) A reading of the enactment demonstrates that this act is nothing more than a procedural act spelling out the procedure to be followed in the taking of private property for public use. In Appendix "B" we have set forth the pertinent sections of this enactment as they apply to the questions raised by this petition. We find that in Section 2 the necessary averments in the condemnation petition are spelled out. It is here noted that the instant proceedings were brought under Section 2. Section 2(a) treats with the right to take before compensation is awarded by a deposit of funds with the Clerk of the Court. Section 5 reads as follows:

> "No cause shall be heard earlier than twenty days after service upon defendant."

It then provides for the right to file amendments to the petition.

It is further noted that no part of Section 5 or any other section of this statute prescribes any day, time or date when the defendant shall plead nor is there spelled out that a defendant is required to file any pleading in defense of the petition. The Supreme Court of Illinois has so interpreted the statute (see *O'Hare* v. *C., M. & N. R. R. Co.*, 139 Ill. 151; *Chicago Housing Authority* v. *Berkson*, 415 Ill. 159). It is most singular, however, that where the property is taken prior to the trial as to compensation that by Sec. 5(a) it is provided that a defendant

desiring to challenge the validity of the taking shall do so by written pleading either on the return day of the summons or within 20 days after the filing of the declaration of taking. We therefore present the following query: the legislature having adopted a procedural act fixed the time to plead in one type of proceedings and did not fix the time to plead or even to declare that any pleading should be filed where the taking is postponed until after trial. Why? Was it not intended that in the latter type of case no defense pleading was necessary and ergo that the right of a defendant to raise all questions relative to the right to take may be asserted at any time prior to the ultimate judgment day fixing compensation; or at least until the time that a jury trial commences; and we urge that no pleading was necessary or at least that such a pleading might be filed and must be passed upon before a hearing commences upon the issue of fair compensation. The foregoing is strongly indicated if the Supreme Court of Illinois in the cases hereinabove cited (*O'Hare* v. *C., M. & N. R. R. Co.*, 139 Ill. 151; *Chicago Housing Authority* v. *Berkson*, 415 Ill. 519).

In Illinois the Supreme Court is committed to the doctrine that rules of practice are a legislative function; ergo if the legislature sees fit to differentiate as to the required filing or non filing of certain pleadings such declaration of policy is binding on the Illinois Courts. Postponement of trials, confusion and the crowding of calendars are matters upon which the appeal to the legislature should be made in these condemnation cases and should not be the basis of policy declaration by judicial fiat.

In spite of the fact that the legislature neither required a pleading to be filed by the defendant or is any fixed a time for contest as to validity and right to take, the

Trial Judge took it upon himself about six months after the suit was filed to enter a barring order (R. 20) fixing 7 days within which to file a contest pleading or in the alternative to be deemed to have waived the right to contest at any time thereafter. Thereupon when the petitioner here sought on three occasions to file a challenging pleading all before trial as to compensation (R. 34, 43, 62) two Trial Judges adhering to the barring order (R. 20) refused to entertain such pleading treating the barring order as valid and the exercise of discretion by the judge who entered the order; and the Supreme Court of Illinois (Appendix A) in its opinion recognizing the all important right of private property owners to be protected in their property rights, continued to consider the question as one of discretionary prerogative in the trial court and not as effecting substantial or fundamental rights; for we find the Supreme Court of Illinois saying,

> "Nor are we unmindful that the process of taking private property for public use may be tyranically and unfairly exercised; and that the right of an individual to protect his property against the taking by the State is a sacred one * * *"

By this language the Supreme Court may have given the answer to the question we have propounded here and has given the reason why the legislature deliberately refused to provide for the filing of any pleading or to say the least fixed a barring date for the filing of a defense pleading. The right of an individual in condemnation cases is a "sacred one" and he should have all and every opportunity to protect the right. If the right of protection is a "sacred one" then any attempt to bar that right by an unauthorized court order, defies an opportunity to be heard. Such an order is an en-

croachment by a court on the prerogative of the legislature and is wholly outside of the powers of the court.

In the case at bar this is particularly emphasized by the fact that the petitioner charged that the right to take in the suit as brought was defiant of both the State and Federal Constitutions (R. 47). She was denied the right and opportunity to urge such questions by the unconstitutional court order.

In the opinion of the Supreme Court (Appendix A) it is stated that the record discloses that, early in 1954 this petitioner's then counsel stated that he did not intend to file a contesting pleading, from which a waiver is attempted to be spelled out. No reference is made to the record itself to support the assertion. Such statement is not borne out by the record. The assertion is not borne out by any court order or finding; it is found in statement made by the Land Commission's counsel (R. 56) in addressing the trial judge in opposition to then pending second or third motion for leave to file a traverse pleading. To the contrary, however the record discloses an order entered on April 22, 1955 (R. 34) overruling defendant's first motion for leave to file a traverse. While the order bespeaks of a substitution of attorneys in behalf of the petitioner here for the attorney who supposedly waived the contest right, it is completely silent as to the so called waiver. One would think that if there was such a waiver, the Court would bespeak thereof in denying the application for leave to contest when first made as at least one of the reasons for overruling said motion. All in all considered, it is respectfully submitted that the refusal of the Illinois Courts to permit the contest as sought by the petitioner was an unlawful denial to her of an opportunity to be heard on a fundamental issue in a condemnation proceeding.

Petitioner prays that a writ of certiorari be granted to her.

Respectfully submitted,

WILLIAM D. SALTIEL,
Attorney for Petitioner.

APPENDIX A.

The opinion of the Supreme Court of Illinois in the instant case, Docket No. 34074—September Term, 1956, Chicago Land Clearance Commission, Appellee, vs. Irma C. Rosenau et al.—(Florence Kostner, Appellant.) (10 Ill. 2d 501)

Mr. Justice Bristow delivered the opinion of the court:

This appeal presents but a single issue, namely did the trial court act improperly in denying leave to appellant, Florence Kostner, to file a traverse to a petition to condemn three vacant parcels of property owned by her. Chronologically we will outline the proceedings in the court below: the petition to condemn was filed on April 2, 1953; appellant's appearance was entered by a competent firm of lawyers on May 14, 1953; on September 14, 1953, on a preliminary call of the condemnation calendar, October 1, 1953, was fixed as the date for a pretrial conference for the purpose of ascertaining just compensation and hearing was ordered on traverses then on file a to certain parcels to be set for October 6, 1953; the instant case was on the trial call and was continued from time to time for the purpose of a hearing on the issue of just compensation, and the docket entry evidencing same appears as of these dates, October 1, 1953, November 2 and 16, 1953, December 7 and 21, 1953, January 18 and 25, 1954. Throughtout, there was no request made for leave to file a traverse.

On January 26, 1954, an order was entered requiring all defendants desiring to contest the right of petitioner to maintain the condemnation suit, and who had not theretofore done so, to file a traverse or other pleading con-

testing petitioner's right to condemn within seven days from the date of this order, or be deemed to have waived the right to file such pleading. Immediately thereafter, James A. Harrington, one of Mrs. Kostner's attorneys, stated to the court that he did not intend to file traverse on behalf of the properties involved in this appeal, but would abide the court's decision on traverse then pending as to other parcels in the proceeding.

After the January 26, 1954, order, the case involving the parcels of real estate herein was placed again on the trial call and was continued from time to time for the sole purpose of hearing the issue of just compensation. The record discloses continuance orders as of these dates: January 27 and 28, 1954; February 2, 1954, March 29 and 31, 1954, May 6, 24, 25, 26, 27 and 28, 1954; June 1, 7, 8, 9, 10, 11, 22 and 29, 1954; September 20, 1954; October 25 and 27, 1954; November 15 and 22, 1954; December 15 and 17, 1954, and January 24, 1955. Then the cause was continued to February 14, 1955. It will thus appear that almost one year elapsed after the order of January 26, 1954, and there was still no request to file a traverse.

On February 11, 1955, a motion was presented to the trial court for leave to substitute Joseph O. Kostner and Boyle & Friedman as attorneys for Mrs. Kostner, in lieu of Arvey, Hodes & Mantynband and James A. Harrington, and also for leave to file a traverse on behalf of Mrs. Kostner. This was denied on the same date. Later Boyle and Friedman withdrew as counsel for Mrs. Kostner. No showing by affidavit or otherwise was made to excuse Mrs. Kostner's long delay. On April 22, 1955, an order was entered by Hon. Denis J. Normoyle as follows: "It is further noted by the Court that Parcels 1-9 and 4-56 represented by Joseph O. Kostner, an attorney, have been continuously on the trial call on each court day from April 11,

1955, to the date hereof and the said Attorney has failed to appear and answer. Pursuant to the Court's direction, William F. Morrisey, attorney, informs the Court that he called Joseph O. Kostner yesterday, April 21st, to be present this date and that Mr. Kostner said he would appear. It is now 10:30 o'clock a.m. and Mr. Kostner has failed to appear and answer. It is therefore ordered that the trial on the issue of just compensation as to Parcels 1-9 and 4-56 be, and it is, again continued and set for Monday, April 25, 1955 at 10:00 a.m." Mr. Kostner was notified of this order.

On April 28, 1955, a petition for change of venue was filed on behalf of Mrs. Kostner, (hereinafter called defendant,) stating her belief "that she will not receive a fair trial because the trial court is prejudiced against her and that she was first apprised of said prejudice within the preceding five days." This petition was granted over the objection of petitioner and the cause was transferred to the chief justice for reassignment. The cause was set for trial for May 23, 1955, and on that date Joseph O. Kostner withdrew as attorney for defendant and Wisch and Crane entered their appearance as her attorneys. On May 31, 1955, on order was entered setting the trial on the issue of just compensation for June 13, 1955, at the head of the trial call and on that date an order was entered that the substitution of attorneys, filed on May 23, 1955, by Wisch and Crane, be withdrawn and that the appearance of Joseph O. Kostner heretofore filed in the cause stand as the appearance for the defendant.

After the change of venue was granted on April 28, 1955, the case was assigned to Judge Lee W. Carrier, who then entered three orders. The first was on May 4, 1955, setting the trial "on the issue of just compensation" on

May 23, 1955; the second May 23, 1955, on stipulation of defendant's attorney, consolidating certain parcels owned by her "on the issue of just compensation;" and the third on May 31, 1955, setting the trial "on the issue of just compensation" for June 13, 1955. At no time throughout this period was there any intimation of a desire to file a traverse.

On June 13, 1955, a petition verified by defendant was presented to the court and in it she stated: "due to her hospitalization in the winter and spring of 1954 and convalescence during the summer that she was unable to see. That she further believed that her rights to dispute the taking were being protected by her attorney. That no traverse was filed as she desired. That on February 16, 1955, after she had been apprised of the fact that no traverse was filed, she believed that a written request to file a traverse and an appearance of new counsel would be made. That this was not done and no appearance was entered. That she was endeavoring to secure experienced counsel until May 25, and was unsuccessful due to the acceptance and refusal of various attorneys."

Then a new law firm entered their appearance, namely, Mortimer, Knowland, O'Malley and Dunne. The petition for leave to file a traverse having been denied, there was a trial, the results of which were set aside for reasons not important on this appeal. On October 24, 1955, a second trial was commenced and Judge Carrier's illness necessitated a mistrial order.

The cause was again set for trial on February 6, 1956, before Judge Ezra Clark. Three days prior thereto defendant's attorney filed a motion, together with his affidavit, requesting that the order entered on June 13, 1955, denying leave to file a traverse be reconsidered. The court, in

denying this motion stated: "I am certainly inclined to think that in view of all the circumstances, the order entered by Judge Normoyle referring to the filing of any traverse that the Respondent desired to file within a time fixed by the court in that order is certainly a valid order. It is certainly within his jurisdiction. That order was not complied with. Subsequent to that time the same motion was presented to Judge Carrier. The motion was denied. So far as I am concerned, I am not at this date and in view of the circumstances going to allow the motion. The motion will be denied, and we will proceed to trial upon the issue of just compensation."

Then on February 18, 1956, there was a trial resulting in a judgment order ascertaining just compensation for the parcels of land here involved. This appeal followed. It hardly seems necessary, in view of the foregoing history of this proceeding, to discuss reasons or precedents in support of our conclusion that this judgment should be affirmed. This summary treatment does not signify that we have not considered the able briefs presented on both sides; nor are we unmindful that the process of taking private property for public use may be tyranically and unfairly exercised; and that the right of an individual to protect his property against the taking by the State is a sacred one. Of importance, too, is the necessity for orderly and prompt disposition of the ever increasing number of condemnation proceedings. Progress with its highways and toll-roads construction, school programs and the clearance of slum and blighted areas have added their share to this mounting increase. If all defendants in a condemnation proceeding are required to file their traverses or motions to dismiss within a specified time, then the trial court can control its calendar and try all those traverses which raise the same question and dispose of them on one hearing.

On the other hand, if each defendant is to have the right to file his traverse or motion to dismiss whenever he sees fit to do so, then the trial court will be obliged to try the very same question over and over again. This would compounds the evils that the crowded court calendars in Cook County already present.

We therefore conclude that the trial court did not abuse its discretion in refusing leave to Mrs. Kostner to file a traverse, and the judgment of the trial court is affirmed.

Judgment affirmed.

APPENDIX B.

Chap. 47 Ill. Rev. Stat. 1955.

§ 2. **Proceedings—Parties**

Where the right to take private property for public use, without the owner's consent or the right to construct or maintain any public road, railroad, plank-road, turnpike road, canal or other public work or improvement, or which may damage property not actually taken has been heretofore or shall hereafter be conferred by general law or special charter upon any corporate or municipal authority, public body, officer or agent, person, commissioner or corporation and the compensation to be paid for or in respect of the property sought to be appropriated or damaged for the purposes above mentioned cannot be agreed upon by the parties interested, or in case the owner of the property is incapable of consenting, or his name or residence is unknown, or he is a non-resident of the state, it shall be lawful for the party authorized to take or damage the property so required, or to construct, operate and maintain any public road, railroad, plankroad, turnpike road, canal or other public work or improvement, to apply to the circuit or county court of the county where the said property or any part thereof is situate, or to the judge thereof in vacation by filing with the clerk a petition, setting forth, by reference, his or their authority in the premises, the purpose for which the said property is sought to be taken or damaged, a description of the property, the names of all persons interested therein as owners or otherwise, as appearing of record, if known, or if not known stating that fact and praying such court or judge to cause the compensation to be paid to the owner to be assessed. If the proceedings seek to affect the property

of persons under guardianship, the guardians, or conservators of persons having conservators, shall be made parties defendant, and if of married women their husbands shall also be made parties. Persons interested, whose names are unknown, may be made parties defendant by the description of the unknown owners; but in all such cases an affidavit shall be filed by or on behalf of the petitioner, setting forth that the names of such persons are unknown. Where the property is sought to be taken or damaged by the state for the purpose of establishing, operating or maintaining any state house or state charitable or other state institutions or improvements, the petition shall be signed by the governor or such other person as he shall direct, or as shall be provided by law. 1872, April 10, Laws 1871-2, p. 402, § 2; 1933 June 21, Laws 1933, p. 586, § 1.

§ 2a. Declaration of taking—Title vests in State when—Judgment—Clerk's fee—Payment of money deposited in court—Postponement of right of entry—Orders

In any proceeding instituted by and in the name of the State of Illinois under this Act,[1] for the purpose of acquiring title to any real property, for highway purposes, and for housing purposes provided for in the "Blighted Vacant Areas Development Act of 1949," enacted by the 66th General Assembly,[2] the petitioner may file in the cause with the petition, or at any time before judgment, a declaration of taking signed by the Governor of the State of Illinois, or his duly authorized agent in that behalf, declaring that such real property is thereby taken for a public purpose of the State of Illinois. The declaration of taking shall contain or have annexed thereto the following:

(1) A statement of the public use for which such real property is taken.

(2) A description of the real property taken sufficient for the identification thereof.

(3) A statement of the estate or interest in such real property taken for said public use.

(4) A plan showing the real property taken.

(5) A statement of the amount of money estimated to be just compensation for the real property taken.

Upon the filing of the declaration of taking and of the deposit with the Clerk of the Court in which the proceeding is pending, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in the declaration, title to the real property in fee simple absolute, or such less estate or interest therein as is specified in the declaration, shall vest in the State of Illinois, and such real property shall be deemed to be condemned and taken for the use of the State of Illinois, and the right to just compensation for the same shall vest in the person or persons entitled thereto. Such compensation shall be ascertained and awarded in the proceeding and established by judgment therein, and the judgment shall include, as part of the just compensation awarded, interest at the rate of six per cent per annum on the amount finally awarded as the value of the real property from the date title vests in the State of Illinois to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the Clerk of the Court. A reasonable fee to be fixed by the Court and paid by the State of Illinois shall be allowed to the Clerk of the Court for receiving, retaining or disbursing any moneys deposited with the Clerk of the Court in accordance with this section.

Upon the application of any party in interest, and upon due notice to all parties, the Court shall order that the

money deposited in the Court, or any part thereof, be paid forthwith to the person or persons entitled thereto for and on account of the just compensation to be awarded in the proceeding, without prejudice to the further rights of any party to the proceeding. If the compensation finally awarded shall exceed the amount of money so deposited, the Court shall enter judgment against the State of Illinois and in favor of the party or parties entitled thereto for the amount of the deficiency. If the compensation finally awarded shall be less than the amount of money so deposited and paid out, the Court shall enter judgment in favor of the State of Illinois and against the proper party or parties for the amount of the excess.

Upon the filing of the declaration of taking and the deposit with the Clerk of the Court of the estimated compensation, the State of Illinois shall thereupon have the right of entry and the parties in possession shall be required to surrender possession to the petitioner; provided, however, in case of undue hardship to the persons in possession the Court may postpone said right of entry to a day in no event no later than six (6) months after the date that title vests in the State of Illinois; and provided, further, that no right of entry shall be exercised earlier than five (5) days after such vesting of title; and provided, further, that the Court shall not postpone such right of entry in any case where the party in possession has received any part of the award, unless such party agrees to pay to the State of Illinois during the period of his occupancy such reasonable rental as may be fixed by the Court.

The Court shall have power to direct the payment of delinquent taxes and special assessments out of the amount determined as just compensation and to make such orders in respect of encumbrances, liens, rents, insurance, and

other charges, if any, as shall be just and equitable. 1872, April 10, Laws 1871-72, p. 402, § 2a, added 1947, July 21, Laws 1947, p. 905, § 1, as amended 1949, Aug. 13, Laws 1949, p. 866, § 1.

§ 5. Hearing

No cause shall be heard earlier than twenty days after service upon defendant or upon due publication against non-residents.

Any number of separate parcels of property, situate in the same county, may be included in one petition, and the compensation for each shall be assessed separately by the same or different juries, as the court or judge may direct.

Amendments to the petition, or to any paper or record in the cause, may be permitted whenever necessary to a fair trial and final determination of the questions involved.

Should it become necessary at the any stage of the proceedings to bring a new party before the court or judge, the court or judge shall have the power to make such rule or order in relation thereto as may be deemed reasonable and proper; and shall have power to make all necessary rules and orders for notice to parties of the pendency of the proceedings, and to issue all process necessary to the execution of orders and judgments as may be entered. 1872, April 10, Laws 1871-72, p. 402, § 5; 1933, June 21, Laws 1933, p. 586, § 1; 1935, June 28, Laws 1935, p. 826, § 1.

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[1] Section 1 et seq. of this chapter.
[2] Chapter 67½, §§91.1-91.7.

§ 5a. **Motion to strike declaration of taking and dismiss suit**

In any case in which a declaration of taking has been filed as provided in Section 2a,[1] supra, any defendant desiring to raise any question with respect to the validity of the taking shall do so by filing a motion to strike the declaration of taking and dismiss the suit. The motion shall be made on or before the return day mentioned in the summons or notice of publication, or within 20 days after the filing of declaration of taking, whichever is later. Failure to file such motion within the time herein provided is a waiver of the right of any defendant to challenge the validity of taking. 1872, April 10, Laws 1871-72, p. 402, § 5a, added 1949, Aug. 13, Laws 1949, p. 866, § 1.

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[1] Section 2a of this chapter.

APPENDIX C.

Trial Judge's opinion found on p. 62 of Record:

The Court: "I don't think it makes one bit of difference. The question involved here is subsequent filing. The very simple question presented to this Court as to whether at this time in view of all that has transpired in the past, in the intervening time between the filing of the petition and the present date, whether at this time the Court could permit the filing of the traverse without regard to when, under the law, a traverse must be filed; and after listening to arguments of counsel, the Court does not see, has not had it pointed out to him, any particular, definite, specific law in regards to this matter.

I'm certainly inclined to think that in view of all the circumstances, the order entered by Judge Normoyle referring to the filing of any traverse that the Respondent desired to file within a time fixed by the Court, in that order is certainly a valid order. It is certainly within his jurisdiction. That order was not complied with. Subsequent to that time the same motion was presented to Judge Carrier. The motion was denied.

So, as far as I am concerned, I am not at this date and in view of the circumstances going to allow the motion. The motion will be denied and we will proceed to trial upon the issue of just compensation.

APPENDIX D.

Final Orders of Supreme Court of Illinois.

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the Circuit Court of Cook County aforesaid, be affirmed in all things and stand in full force and effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said appellee recover of and from the said appellant costs by it in this behalf expended, to be taxed, and that it have execution therefor. Entered on January 14, 1957.

On March 19, 1957 the following order was entered:

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause.